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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., *et al.*,

Petitioners,

v.

AGENCY FOR INTERNATIONAL DEVELOPMENT, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF ASSOCIATION FOR VOLUNTARY SURGICAL CONTRACEPTION, THE PATHFINDER FUND, THE POPULATION COUNCIL, CENTER FOR POPULATION AND FAMILY HEALTH, THE ALAN GUTTMACHER INSTITUTE, INTERNATIONAL PROJECTS ASSISTANCE SERVICES, INTERNATIONAL WOMEN'S HEALTH COALITION AND POPULATION CRISIS COMMITTEE AS AMICI CURIAE IN SUPPORT OF PETITIONERS

DINA R. LASSOW
(Counsel of Record)
ELDON V.C. GREENBERG
GALLOWAY & GREENBERG
1835 K Street, N.W.
Suite 801
Washington, D.C. 20006
(202) 833-9084
Attorneys for Amici

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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INTEREST OF AMICI CURIAE

Amici are domestic, private, nonprofit organizations involved in the fields of international family planning and reproductive health care.[1] In the course of their activi-

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[1] Letters of consent to the filing of this Brief from all parties have been submitted to the Court. A description of each *amicus* is set forth in the Appendix to the Brief.

ties, *amici* are regularly confronted with the maternal morbidity and mortality caused by unsafe abortions. Every year an estimated 30-45 million women in developing countries resort to abortion, and 125,000 to 250,000 of these women die from "botched" abortions. An uncounted number of those who live are left with permanent health problems.[2] Desperate women may drink toxic solutions, or seek to induce abortions with sharp objects such as chicken feathers or meat skewers, causing infections and severe hemorraging.[3] Hospitals in developing countries are overwhelmed with women suffering the effects of septic, or infected, and incomplete abortions. The women may be forced to wait for twelve hours or more, bleeding, on the concrete floors of hospital hallways to see a physician or for an operating room to become available. No blankets or other covers are provided.[4] These women are of all ages and backgrounds. Some are adolescents and some already have five or more children.[5]

As part of their work, *amici* want to help groups in the developing countries address these terrible problems. Some of *amici*, such as Association for Voluntary Surgical Contraception, Center for Population and Family Health, The Pathfinder Fund and The Population Council, are major participants in the international family planning assistance program administered by the Agency

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[2] A. Germain and J. Ordway, *Population Control and Women's Health: Balancing the Scales*, International Women's Health Coalition (June 1989) at 5.

[3] *The Effect of the Mexico City Policy on International Family Planning: Hearing Before the Subcomm. on International Operations of the House Comm. on Foreign Affairs*, 101st Cong., 1st Sess. 27-28 (1989) ("Subcommittee Hearing").

[4] M.A. Castle, R. Likwa and M. Whittaker, *Observations on Abortion in Zambia* (May 1989).

[5] J. Blane and M. Friedman, *Mexico City Policy Implementation Study*, prepared for AID by the Population Technical Assistance Project (Nov. 1990) ("Implementation Study"), Appendix B.

for International Development ("AID") under the Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2151, *et seq.* Under cooperative agreements or other arrangements with AID, they subcontract millions of dollars to family planning projects run by governmental and nongovernmental organizations ("NGOs") in developing countries.

AID's cooperative agreements include the Standard Clause that is being challenged by petitioners, the Planned Parenthood Federation of America, the Planned Parenthood Center of El Paso, and certain individuals.[6] The Standard Clause, which is intended to implement the Mexico City Statement issued by the United States government at the International Conference on Population at Mexico City in 1984, provides that foreign NGOs that receive AID funds may not use funds from *any* source for a broad range of speech-related activities that are defined to be "actively promoting abortion as a method of family planning." These activities include giving women accurate, complete medical information about all their options in the event of pregnancy, publicly disseminating information about the need for safe abortions, and lobbying for changes in restrictive abortion laws.[7]

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[6] A complete description of the Clause and the *Planned Parenthood Federation of America* litigation is contained in the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[7] In addition, many NGOs that are subject to the Standard Clause have approached "the abortion question with an overcautiousness that extends to activities clearly permitted under the [Clause]. This overcautiousness is based on a fear that any association with abortion-related activities, however indirect, could place a program's funding in jeopardy." Implementation Study at 23. For example, staff in some clinics have been told not to make any abortion referrals, even under the limited circumstances under which they are permitted under the Clause—where abortion is legal and a woman has already decided she wants an abortion. *Id.* at 23-24. In other projects, employees are getting incomplete medical histories and not documenting information about abortions because project

Petitioners' Appendix ("Pet. App.") at 77a-83a. *Amici* who have signed cooperative agreements with AID are responsible for ensuring that foreign NGOs comply with the Standard Clause. *Id.*

Amici that receive AID money also subgrant other funds—which may come from private donors, other governments or international organizations—to groups in developing countries. Other *amici*, such as International Projects Assistance Services, International Women's Health Coalition and Population Crisis Committee, do not receive any AID funding to assist them in their goals of improving reproductive health care for women and encouraging voluntary family planning. Regardless of the source of funding, almost all of *amici's* projects in foreign countries are, and must be, carried out in collaboration with local groups, including NGOs.

Amici do not "actively promote" abortion as the phrase "actively promote" is generally defined. Indeed, their work is directed at reducing the need for women to resort to abortion by promoting the availability of contraception. However, *amici* believe that if contraceptives fail or are not available, women should be able to have access to safe abortions, rather than being forced to resort to dangerous clandestine procedures. They can only

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directors are afraid to have the word "abortion" in their medical charts. *Id.* at 24. Physicians who work part-time in private AID-funded clinics in Bangladesh, where menstrual regulation is legal, have been told that they cannot perform this procedure in their private practices or in government clinics. *Id.* at 25.

Data collection and "a broad range of research activities" have also been adversely affected by the overcautious response to the clause. *Id.* As stated by one Egyptian family planner: "Since the Mexico City Policy took place, all discussion of abortion and abortion-related issues has stopped. Those receiving A.I.D. funding are frightened of the policy and have thus turned their backs on a significant health issue [septic abortions] that is important in the context of female reproductive health." *Id.*

attempt to begin to provide such access by collaborating with organizations in the developing countries. The Standard Clause interferes with their efforts by violating *amici's* First Amendment right to associate, with non-AID funds, with foreign NGOs in speech-related activities that would help further the goals of alleviating the maternal morbidity and mortality caused by unsafe abortions, and providing complete reproductive health care. *Amici's* constitutional rights are also violated because an AID-funded domestic NGO's responsibility for enforcing the Standard Clause requires the organization to promote an anti-abortion viewpoint with which it does not agree.

REASONS FOR GRANTING THE PETITION

I. THE STANDARD CLAUSE VIOLATES AMERICANS' FIRST AMENDMENT RIGHTS OF SPEECH AND ASSOCIATION

AID recognizes that it cannot constitutionally restrict *amici's* direct use of their own funds. *FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Therefore, the Standard Clause only requires a domestic NGO to accept limits on the use of AID funds. The domestic NGO can engage in abortion-related speech with other funds, as long as those funds are kept separate and as long as the speech is not in association with AID-funded foreign NGOs. Pet. App. at 77a.

Speech in association with foreign NGOs is treated differently because AID does not allow the foreign groups the free speech and association that is cherished by Americans. If foreign NGOs want AID funding, they cannot have anything to do with speech-related activities that may be deemed to "actively promote abortion" as the Standard Clause very broadly defines "actively promote," whether those activities are funded by private groups,

governments other than the United States, or international organizations.[8]

Contrary to the decision below, the Standard Clause does not constitute merely a failure "to subsidize the exercise of a fundamental right" by domestic NGOs, which is not subject to strict scrutiny. Pet. App. at 10a. Petitioners and *amici* are not asking the government to subsidize the exercise of their rights. They are not seeking federal dollars for themselves or for foreign NGOs. The obstacle that has been placed in the path of domestic NGOs that seek to exercise freely their right to associate with foreign NGOs on abortion-related projects is not the lack of a government subsidy for these projects. Rather, it is AID's restriction on the activities in which foreign NGOs may engage with non-AID funds. Therefore, strict scrutiny is mandated. Interference with domestic NGOs' First Amendment rights can only be justified if the Clause is found to be narrowly tailored "to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *accord, Boos v. Barry*, 485 U.S. 312, 321 (1988).

This Court's decisions have established that the right to speak includes the right to be heard by persons in both this country and overseas, and that a restriction on one person's rights affects the rights of others. *Riley v. National Fed'n of the Blind of N.C.*, 487 U.S. 781, 801 n.13 (1988); *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 756-57 (1976); *Lamont v. Postmaster General*, 381 U.S. 301 (1965). Applicable precedents have also recognized that an organization's own rights are violated when government actions inhibit supporters from joining the organization or participating in

[8] The prohibitions in the Clause depend on the viewpoint of the speech. Thus, lobbying for more restrictive abortion laws and counseling women against having an abortion are not prohibited.

its work. *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958). That is the situation here.

Domestic NGOs must do their work overseas in association with local groups. They do not have the staff or the facilities to provide comprehensive family planning or other services. In addition, information, particularly information about a matter as sensitive as abortion, is communicated much more effectively by local health care providers than by outsiders. To the extent that *amici's* projects are more policy-oriented, they must work with influential local groups and officials in an effort to find and implement solutions to problems such as those caused by septic and incomplete abortions. *Amici* accordingly work in conjunction with local hospitals, health care providers, family planning organizations, universities and other groups, many of which are NGOs. Therefore, in restricting the activities of foreign NGOs that are receiving or that may wish to receive AID funds, AID is also necessarily violating the First Amendment rights of the domestic NGOs that want to collaborate with the foreign NGOs.

Many of *amici's* potential collaborators are recipients of AID funds. This is true not only because AID contributes more than 40 percent of the international population assistance that is provided in developing countries,[9] but also because *amici* such as The Pathfinder Fund and The Population Council are major subgrantors of AID funds. In this role, they have sought out and helped to promote the most effective family planning organizations and health care providers. These same grantees are therefore the groups with whom it is most logical for *amici* to collaborate on abortion-related projects.

The court below found that "the Standard Clause does not prohibit [petitioners] from exercising their first

[9] *DKT Memorial Fund v. AID*, 887 F.2d 275, 302 (D.C. Cir. 1989) (dissenting opinion).

amendment rights. [Petitioners] may use their own funds to pursue whatever abortion-related activities they wish in foreign countries." Pet. App. at 11a. However, as just shown, this is an empty right, since neither petitioners nor *amici* can meaningfully pursue any activities in foreign countries without collaborating with local organizations. Moreover, it is no answer to the Clause's interference with the right to speak and associate to suggest that petitioners and *amici* should be able to find local organizations that are not funded by AID with whom to work on projects involving non-pejorative speech about abortion. Under the decisions of this Court, they have a right to select the collaborators that they believe would be most effective in their work:

> That [a statute] leaves open "more burdensome" avenues of communication, does not relieve its burden on First Amendment expression. . . . *The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.*

Meyer v. Grant, 486 U.S. 414, 424 (1988) (citations omitted, emphasis added).

The decision below also conflicts with the decisions of this Court by suggesting that strict scrutiny of the Standard Clause is not necessary because the Clause is part of a foreign aid program. Pet. App. at 13a. The Executive's power in foreign affairs, "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). More recently, this Court examined a law whose purpose was to protect the dignity of foreign diplomats with "the most exacting scrutiny," and found it to violate the First Amendment. *Boos v. Barry*, 485 U.S. at 321-29. Thus, the fact that a program that impacts on foreign affairs is involved here does not obviate the need for strict scrutiny of the Standard Clause.

Once it is subjected to strict scrutiny, the Standard Clause cannot survive. To begin with, it does not serve any "compelling state interest, unrelated to the suppression of ideas," *Roberts v. United States Jaycees*, 468 U.S. at 623, because any alleged foreign policy interest that may be asserted by AID cannot be separated from the suppression of ideas about abortion that AID does not like.

Moreover, the ostensible goals of the Mexico City Statement could readily "be achieved through means significantly less restrictive of associational freedoms." *Id.* Foreign NGOs, like domestic NGOs and foreign governmental organizations, could be required to segregate their accounts, to ensure that no U.S. funds are used for certain abortion-related projects. This would minimize the interference with the associational freedoms of the domestic NGOs in their use of non-AID funds.

In addition, the Standard Clause goes well beyond the Mexico City Statement in its definitions of "abortion as a method of family planning" and "active promotion of abortion." Promoting abortion as a method of family planning logically means advising women not to use any contraceptive method and to rely on abortion to control the number and spacing of their children. However, the Standard Clause defines "abortion as a method of family planning" to include every abortion that is not needed because of rape or incest or to save the life—not just the health—of the mother. The "active promotion of abortion" is defined not only to preclude actively encouraging a woman to have an abortion, but also to prohibit giving her objective medical information about all her options, including abortion. Pet. App. at 80a-81a. By changing these definitions, AID could readily implement the Mexico City Statement in a manner that would be "significantly less restrictive" of the First Amendment rights of domestic NGOs.

II. THE STANDARD CLAUSE UNCONSTITUTIONALLY FORCES AMERICANS TO PROMOTE A PARTICULAR VIEWPOINT ABOUT ABORTION

Strict scrutiny of the Standard Clause is also mandated because the Clause burdens the free speech of domestic NGOs that have signed, or that might wish to enter into, cooperative agreements with AID by requiring them to promote a viewpoint about abortion with which they do not agree. Domestic NGOs are responsible for insuring that the foreign NGOs to which they subgrant AID funds are in compliance with the Clause, and are not engaged in activities that the domestic NGOs may believe are both necessary and appropriate, such as providing accurate medical information about abortion to women in family planning clinics or publicly disseminating information about the need for safe abortions to end the maternal morbidity and mortality resulting from septic and incomplete abortions.

The responsibility for enforcing the Standard Clause is substantial. Domestic NGOs must initially satisfy themselves that a potential AID subgrantee is not engaged in any abortion-related activities that are barred by the Clause, which often entails visits to clinics and inspection of records. Pet. App. at 77a-80a; Implementation Study at 9-13. The domestic NGO must obtain a written certification from each subgrantee stating that it will comply with the Clause. Compliance must then be monitored on a continuing basis. *Id.*

Insuring compliance with views about abortion that are anathema to *amici* is particularly burdensome when *amici* are working with foreign NGOs in countries where abortion is legal. For example, abortion was legalized in Turkey in 1983 in response to studies that documented the horrors of septic and incomplete abortions. About 15,000 women a year were dying from self-induced abortions, and each of these deaths left an average of four or

five children motherless.[10] As testified to by The Pathfinder Fund's representative in Turkey:

> by prohibiting [Turkish] family planning professionals from providing abortion information, education, referral, or counseling services to their clients, the U.S. is asking them to disobey their own laws. The health provider whose work or institution is supported by U.S. funds, must refuse to answer a woman when she is face to face with someone pregnant who is seeking information about abortion or abortion facilities. Since abortion is legal in Turkey, this puts the health care worker in a position that is unlawful and professionally unethical.[11]

Requiring domestic NGOs to enforce AID's anti-abortion position as a condition of receiving and subgranting AID funds is contrary to the decisions of this Court in cases such as *Wooley v. Maynard*, 430 U.S. 705 (1977) (requiring the display of the state-prescribed license tag slogan as a condition of driving a car is unconstitutional) and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (requiring the recital of the pledge of allegiance as a condition of attending public school violates the First Amendment).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DINA R. LASSOW
(Counsel of Record)
ELDON V.C. GREENBERG
GALLOWAY & GREENBERG
1835 K Street, N.W.
Suite 801
Washington, D.C. 20006
(202) 833-9084
Attorneys for Amici

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[10] Subcommittee Hearing at 168.

[11] *Id.* at 167.

APPENDIX

APPENDIX

Association for Voluntary Surgical Contraception ("AVSC") was incorporated in 1943 to remove obstacles to voluntary sterilization in the United States. It now has an International Division, through which it develops, funds and provides technical support for hundreds of programs throughout the developing world to make quality sterilization services available and accessible to men and women who have decided they do not want more children. AVSC does this by supporting leadership groups, service programs, research, training and provision of equipment. In its activities abroad, AVSC ordinarily works through both foreign governmental bodies and NGOs, and such collaboration is essential to the effectiveness of its projects. AVSC has a comprehensive cooperative agreement with AID for family planning funds covering the period from August 1988 through August 1993. Under this agreement, which includes the Standard Clause, AVSC can receive up to $80 million. AVSC is seeking to expand its non-U.S. government funded international activities, which now comprise close to 10 percent of its budget. It is a plaintiff-appellant in *The Pathfinder Fund v. AID*, 746 F. Supp. 192 (D.D.C. 1990), *appeal pending*, No. 90-5388 (D.C. Cir.).[1]

The Pathfinder Fund ("Pathfinder") was founded in 1957 by Dr. Clarence J. Gamble, a private philanthropist, and was one of the first U.S.-based organizations to address international population issues. Its basic objective is to increase the availability of comprehensive, safe and effective family planning services, thereby improving the welfare of families in developing countries. Pathfinder provides technical assistance, contraceptives and financial support to private and public institutions that provide

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[1] *The Pathfinder Fund v. AID, supra,* which is also a challenge to the Standard Clause, has been stayed by the United States Court of Appeals for the District of Columbia Circuit by Order of February 22, 1991, pending this Court's final decision in this case.

family planning services, education and training to thousands of people throughout the developing world each year. It has supported more than 3000 projects in over 80 countries. At present, it actively supports more than 135 projects in 25 countries. Pathfinder does and must work with foreign NGOs in order to carry out an effective program abroad. Grantees include individuals, community groups, clinics, hospitals, professional organizations, medical and nursing schools, and universities. Since 1967, the Fund has received regular support from AID through a series of funding agreements. It currently has a cooperative agreement with AID that extends until September 30, 1992, with a ceiling of $67 million to support family planning activities. It also receives support under regional cooperative agreements from AID missions in Brazil, Nigeria, Bangladesh, Swaziland, Burundi and the South Pacific. All these agreements include the Standard Clause. In addition, Pathfinder actively seeks to raise funds from sources other than the U.S. government to support critical program initiatives overseas. An endowment fund has been established, and, over the last few years, non-U.S. government contributions have supported approximately 10 percent of Pathfinder's activities abroad. Pathfinder is a plaintiff-appellant in *Pathfinder v. AID*, *supra*.

The Population Council (the "Council") was established in 1952 by John D. Rockefeller 3rd. It works primarily in three areas: biomedical research in the field of human reproduction to develop and improve contraceptive methods; social science research into the causes of population change, their societal implications and appropriate policy responses; and provision of advice and technical assistance to family planning and other population-related programs at local, national and regional levels. The Council provides advice and technical assistance to governments, international agencies and foreign NGOs, and it disseminates information on population issues through publications, conferences, seminars and workshops. The

Council also manages a broad range of projects in developing countries related primarily to improving the performance of family planning programs, identifying determinants of child health and mortality and strengthening the local human and institutional resources needed in these substantive areas. Typically, the Council carries out —and of necessity must carry out—these activities abroad in collaboration with foreign governmental institutions and foreign NGOs. Many of the Council's projects abroad are supported with AID family planning funds. Under a cooperative agreement with AID which runs from July 17, 1988 to August 25, 1993, the Council will operate under a $37 million ceiling for population assistance activities. This agreement includes the Standard Clause. The Council also finances many of its activities through sources other than U.S. government agencies, and is actively seeking to expand these activities. In 1989, for example, $17 million of a total of about $30 million in grants, gifts and other revenues came from such other sources other than U.S. government agencies, and is ac-
v. AID, *supra*.

Center for Population and Family Health (the "Center") is part of Columbia University in the City of New York, and was established to address the poor health conditions that face disadvantaged populations around the world. It is especially interested in issues such as unwanted fertility, high levels of infant and maternal mortality, low infant birth weight, and infectious diseases, including AIDS. The Center addresses these concerns by providing direct services to populations in need, designing and testing innovative methods of service delivery, training future generations of public health workers, conducting relevant basic and applied research, and helping to develop policies directed at improving the status of women and their access to reproductive health care. The Center focuses its efforts on two populations: those people living in its immediate environs (a low-income, largely black and Hispanic community in New York City), and those who live in the villages and urban slums

of developing countries. With regard to the latter population, the Center receives funds from many private sources and has also been a major recipient of AID funds in support of family planning activities in developing countries for some years. It uses both the private and the AID funds to work in collaboration with foreign governmental and nongovernmental organizations.

The Alan Guttmacher Institute ("AGI") is engaged in research, policy analysis, and public education, serving opinion leaders, professionals, and public officials concerned with policy issues related to human reproduction in this country and abroad. AGI's concerns encompass needs and problems of the developing world. AGI publishes a quarterly journal, *International Family Planning Perspectives*, under a grant from AID.

International Projects Assistance Services ("IPAS") works in many nations, especially underdeveloped ones, toward safe reproductive health care for women. It provides training, information, and other educational services on issues of access to and delivery of comprehensive health services, especially abortion. In countries where abortion is illegal or otherwise restricted, IPAS works within the prevailing cultural, legal, and social contexts to reduce the maternal morbidity and mortality associated with unsafe abortion practices. In countries where abortion services are not so restricted, IPAS works to improve access to safe abortion services. IPAS receives no AID funds, but occasionally works with foreign NGOs that do and would do so more widely but for the Clause. It believes that many foreign NGOs are reluctant to work with it for fear of losing eligibility for AID funding.

International Women's Health Coalition ("IWHC") seeks to improve women's reproductive health in the Third World. To that end, it promotes high-quality, comprehensive reproductive health care to enable Third World women to regulate their own fertility safely and effectively by conceiving when desired, terminating unwanted pregnancies safely, and carrying wanted pregnancies to term. IWHC supports innovative health care projects, policy-oriented field research, and public education on reproductive health issues, thereby serving as an advocate and catalyst for change in national and international population and health policies and programs. IWHC receives no AID funding, but the Clause substantially inhibits it from fulfilling its mandate by precluding formal and informal collaboration with major private organizations overseas that depend for survival on AID funds.

Population Crisis Committee ("PCC") seeks to increase public awareness, understanding and action towards the reduction of population growth rates through voluntary family planning. PCC supports privately funded projects in developing countries that provide medical training in the treatment of complications of abortion, including incompetently performed abortions, and in menstrual regulation procedures in countries where abortion is legal. Although PCC receives no AID funding, and hence is not itself required to impose the Standard Clause on the foreign NGOs with which it works, it has found that the Clause has restricted its ability to find qualified NGOs overseas to work with it on its programs, because so many of these groups are subject to the Clause. Among PCC's other activities, it conducts analyses of U.S. population assistance programs, one of which has been a comprehensive study of the impact of the Clause on family planning programs overseas.[2] The findings of this study indicate a significant decline in the availability and quality of safe, legal abortion services and of post-abortion contraceptive counseling, as well as a chilling effect on efforts to deal with the health consequences of illegal abortions, including the suppression of data and analyses related to the problem.

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[2] The results of the study are summarized in Camp, *The Impact of the Mexico City Policy on Women and Health Care in Developing Countries*, 20 N.Y.U. J. of Int'l Law & Pol. 35, 41-50 (1987).